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Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men

The Police used to follow us. Many times, just because I was standing in places frequented by lesbians, they would break in, grab all of the women and place us under arrest. At the police station they would bribe us or beat us. Nobody would help because the society hated lesbians—saw us as deserving any punishment the Police wanted to give. Sometimes the Police would charge women with “perverse activity” and then put them in jail, or worse, institutionalize them in psychiatric “hospitals” for years and years of electric shock therapy. Twice, when they investigated me, I had to lie—to say I wasn’t a lesbian. Luckily, the Police did not continue the investigation. But I am terrified that they will take me away next time.

—an applicant for asylum

In a time marked by dramatic global change, women and men persecuted because they are lesbian or gay form part of the growing pool of international refugees.¹ Their persecution takes the form of police har-

* Staff Attorney, Lambda Legal Defense and Education Fund (New York). The author wishes to thank Deborah Batts, Ignatius Bau, Robert DiPierro, Paula Ettelbrick, J Craig Fong, Richard Goldberg, and Noemi Masliah for their comments and insights.

1. This Article uses the following terms: a) sexual orientation: an enduring erotic, affectional, or romantic attraction to individuals of a particular gender; b) homosexual: a primary or exclusive attraction to individuals of one’s own gender; c) heterosexual: a primary or exclusive attraction to individuals of the other gender; d) bisexual: significant attractions to members of both genders; e) lesbian: describes woman whose personal identity is based on her primary orientation toward an enduring sexual, affectional, or romantic attraction to other women; f) gay: describes man whose personal identity is based on his primary orientation toward an enduring erotic, affectional or romantic attachment to other men; gay is sometimes used to refer to both lesbian women and gay men. See Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer’s Guide to Social Science Research*, 1 LAW AND SEXUALITY 133, 134 (1991). See also John C. Gonsiorek & James D. Weinrich, *The Definition and Scope of Sexual Orientation*, in HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 1-12 (J. Gonsiorek & J. Weinrich eds., 1991) [hereinafter HOMOSEXUALITY].

This Article does not use the term “homosexual” as a noun because of its “clinical connotations and its historic association with pathology.” *Id.* at 134. See generally 26 CORNELL INT’L L.J. 605 (1993)

assment and assault,² involuntary institutionalization and electroshock and drug "treatments,"³ punishment under laws that impose extreme penalties including death for consensual lesbian or gay sexual relations,⁴ murder by paramilitary death squads,⁵ and government inaction in response to criminal assaults against lesbians and gay men.⁶ The survival of these women and men, like the survival of all refugees, depends on obtaining asylum outside the home country. Yet, to date there have been few published decisions internationally and only one in the United States that grant asylum to people in these situations.⁷

To illustrate the eligibility of lesbians and gay men under the legal standard for asylum, this Article argues the hypothetical case of Tatiana, a Romanian lesbian seeking asylum in the United States. As part of its argument, this Article reviews and analyzes the epidemic persecution of lesbians and gay men worldwide.

I. Refugee Status: Who Qualifies?

Under Section 208(a) of the Immigration and Nationality Act (INA),⁸ the Attorney General may grant political asylum to any person who meets the statutory definition of refugee:⁹

Janet Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 U.C.L.A. L. Rev. 915, 916 n.5 (1989).

2. See, e.g., *Matter of Jorge Alberto Inaudi*, File No. T91 04459, Immigration and Refugee Board, Apr. 19, 1992 (Canada) (describing extreme police brutality against Argentinean asylum applicant).

3. See, e.g., Alexandria Duda, Action Secretariat, Int'l Lesbian & Gay Ass'n, COMPARISON OF THE LEGAL SITUATION OF HOMOSEXUALS IN EUROPE I (1993) (on file with *Cornell International Law Journal*) (describing treatment of men and women "convicted" of homosexuality). See also Letter from SAKHI [advocacy group for gay men and lesbians in India] to International Gay and Lesbian Human Rights Commission [IGLHRC] (on file with *Cornell International Law Journal*) (describing harassment, lengthy detention without trial, and "treatment" with heavy doses of lithium of lesbians and gay men in India); Neela Banerjee, *Gay Russians, Deemed Criminals, Begin Testing Limits of Tolerance*, WALL ST. J., May 27, 1992, at A9 (describing abusive treatment of gay Russians in prisons and hard labor camps).

4. Islamic Penal Law, art. 110; IGLHRC Action Alert (Mar./Apr. 1993), "Nicaragua: Supreme Court Delaying Decision" (describing anti-sodomy law in new Nicaraguan penal code that mandates one to three year prison sentences for anyone who "induces, promotes, propagandizes, or practices in a scandalous manner, the cohabitation of individuals of the same sex").

5. See *Matter of Tenorio*, No. A72 093 558 (BIA 1993) (describing anti-gay "commando" groups in Brazil); IGLHRC Action Alert (Feb. 1992) (describing murders of hundreds of gay men in Columbia by paramilitary groups known as "social clean-up death squads").

6. *Matter of Tenorio*, No. A72 093 558, at 15-16 (describing government's failure to investigate or prosecute violence against lesbians or gay men).

7. *Id.* See generally Lambert, *INS Urged to Grant Asylum Over Gay Bias*, WALL ST. J., May 28, 1993, at B7.

8. 8 U.S.C. § 1158(a) (1988).

9. The statute requires the Attorney General to "establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines

Any person who is outside of any country of such person's nationality or, in the case of a person having no nationality is outside any country in which such person habitually resided, and who is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.¹⁰

So long as an applicant "*establishes a well-founded fear of persecution*" based on at least one of the five designated categories, he or she is eligible for asylum. Although "membership in a particular social group" is the classification that most closely describes those persecuted because of their sexual orientation,¹¹ neither the INA nor the related regulations¹² define the category precisely.

To qualify for asylum under any category,¹³ an applicant must establish a well-founded fear of persecution by showing that a reasonable person in his or her circumstances would fear persecution.¹⁴ He or she must present "direct, credible evidence supporting the claim" which

that such alien is a refugee within the meaning of Section 1101(a)(42)(A) of this title." 8 U.S.C. § 1158(a) (1988).

In cases where the Attorney General decides against exercising his or her discretion to grant asylum but "determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality membership in a particular social group, or political opinion," the Attorney General may not return the alien to that country and must order deportation to be withheld. 8 U.S.C. § 1253(h) (West Supp. 1991).

10. 8 U.S.C. § 1101(a)(42)(A) (1988). This definition, first adopted by Congress in the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1982) (codified as amended in scattered sections of 8 U.S.C.) restates the definition of refugee from the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. The Protocol, to which the United States acceded in 1968, took its definition of refugee from the 1951 United Nations Refugee Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150.

Analyzing the statute, the Supreme Court has found that "[i]f one thing is clear from the legislative definition of 'refugee' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring the United States law into conformance with the 1967 United States Protocol Relating to the Status of Refugees (citation omitted)." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987). See T. David Parish, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 924-26 (1992).

11. Political opinion is another category into which many lesbians and gay asylum applicants may fit, particularly if they were identified and persecuted on the basis of advocacy for lesbians and gay men.

12. 8 C.F.R. § 208.13(b)(1) (1993).

13. The standards of proof for establishing eligibility for asylum and withholding of deportation differ. The well-founded fear standard in the asylum statute requires proof that such persecution would be a "reasonable possibility," a standard of proof which is less than a probability. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987). To establish eligibility for withholding of deportation, an alien must meet the higher burden of proving that the threat to his or her life is more probable than not. *Id.* at 428.

14. *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987). See also *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir. 1969) (defining persecution as "infliction of suffering or harm upon those who differ . . . in a way regarded as offensive").

supports his or her "sincere and deeply-felt fear" of persecution.¹⁵ Moreover, the corroborating evidence should demonstrate that the applicant's fear has a "basis . . . in the reality of the circumstance."¹⁶

II. Tatiana's Case

As a lesbian in Romania, Tatiana lives in fear of persecution under a national law which criminalizes and severely punishes consensual sexual relations between women.¹⁷ She has also personally experienced and continues to fear the police and other representatives of the state who rely on this and related laws to harass and detain in "preventive custody" women and men who are lesbian or gay.¹⁸ On the basis of these laws, which reflect a policy that homosexuality is "a mental disease and sinful sickness,"¹⁹ several lesbians and gay men Tatiana knows have been detained and confined to psychiatric facilities to undergo electroshock and drug therapy. Even those who attempted to deny their lesbian or gay identity upon arrest were investigated, identified, and kept in detention. Tatiana lives in fear that she too will be arrested on trumped up charges and forced to undergo treatment that would effectively end her life.

In light of her documentary evidence establishing that Romania persecutes lesbian women on the basis of their sexual orientation, Tatiana has a well-founded fear of persecution. The critical question,

15. *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1394 (9th Cir. 1985). Evidence of the government's treatment of other similarly situated group members can also establish an applicant's well-founded fear of persecution. *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987); OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 43 (1979) [hereinafter HANDBOOK]; *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1283 n.11 (9th Cir. 1984).

16. *Blanco-Comarribas v. INS*, 830 F.2d 1039, 1042 (9th Cir. 1987). Because women and men face threats of persecution simply for identifying themselves as lesbian or gay, documenting the actual instance of persecution—in addition to the policies reflected in punitive laws and practices—is often a difficult task. See discussion of *Sanchez-Trujillo*, *infra* note 43 and accompanying text.

Moreover, until recently, mainstream human rights organizations did not monitor persecution based on sexual orientation. The San Francisco-based IGLHRC has emerged as a leading resource for documentation of global persecution of lesbians and gay men.

17. Laws which impose unduly harsh and disproportionate punishment on practices of a particular group within a population, based on religion or sexual orientation, for example, may alone amount to persecution. See *infra* notes 80-86 and accompanying text.

18. See *Duda*, *supra* note 3, at 1 (noting that "even the attempt to 'engage in homosexual behaviour'," including sexual contact between women, is illegal); see Letter from Adrian Duta, Undersecretary of State, Romanian Ministry of Justice, to Stephan Cooper (July 1992) (discussing Romanian Penal Code offenses including "homosexuality" (article 200) and "sexual perversity" (article 201) and describing detention and disappearance of gay men under "preventive custody" on charge of "outrage against good manners and causing a serious disturbance") (on file with the *Cornell International Law Journal*).

19. *Duda*, *supra* note 3.

therefore, is whether as a lesbian, Tatiana is eligible for asylum as a member of "a particular social group."²⁰

III. Setting the Standard: Particular Social Group

Providing asylum from identity-based attacks led or endorsed by an applicant's country of origin is a central goal of American refugee law.²¹ Like the other four classifications for asylum eligibility, the "particular social group" category thus offers the possibility of protection to those targeted for who they are or what they believe.

While courts differ over the precise definition of social group, men and women persecuted because they are gay or lesbian are persecuted for their membership in a group of people who share a common central feature of their individual identities—gay or lesbian sexual orientation. In the instant case, Tatiana is subject to persecution not only for expressing her sexual orientation by her sexual conduct but also simply for being a lesbian.²²

Judicial interpretations of the "membership in a particular social group" category vary. In *Matter of Acosta*, the Board of Immigration Appeals (BIA) considered whether young urban men of draft age in El Salvador constituted a particular social group for purposes of asylum eligibility in the United States. It described critical elements common to most analyses:

[The statute addresses] persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The *shared characteristic might be an innate one* such as sex, color, or kinship ties, *or in some circumstances it might be a shared past experience* such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis.²³

Although the BIA rejected the argument that young men of draft age constituted a social group and denied Acosta's application, it offered a useful description of the common characteristic which unites group members: "[the characteristic] must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."²⁴ As discussed below, sexual orientation is both highly resistant to change and so fundamental to individual identity that individuals "should not be required to change" to avoid state persecution.²⁵

20. 8 U.S.C. § 1101(a)(42)(A) (1988).

21. *Id.*

22. *See supra* notes 17-18 and accompanying text.

23. *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985) (emphasis added).

24. *Id.*

25. The Board of Immigration Appeals (BIA) determined that sexual orientation is an immutable characteristic. *See Matter of Toboso*, No. A23, 220, 644 (BIA 1990). *Cf. Matter of Terorio*, No. A72 093 558, at 14 ("Sexual orientation is arguably an

Tatiana, therefore, should not be required to change or repress her lesbian identity in order to survive.

The BIA also considered whether Acosta belonged to a class that the government "seek[s] to overcome by means of punishment of some sort."²⁶ In light of Romania's policies and practices toward lesbians it is clear that as a lesbian Tatiana belongs to such a class.

Using similar criteria, the First Circuit has defined a "particular social group" as comprising persons of "similar background, habits or social status."²⁷ Granting the asylum application of a Ghanaian woman who feared persecution based on a combination of her family ties and political activities, the *Ananeh-Firempong* court explained that "the threat of persecution arises out of characteristics that are essentially beyond the petitioner's power to change."²⁸

The *Ananeh-Firempong* court drew its interpretation from the definition of "particular social group" developed by the United Nations High Commissioner for Refugees (UNHCR) for its *Handbook on Procedures and Criteria for Determining Refugee Status*.²⁹ The UNHCR *Handbook*, which "is widely considered useful in giving content to the obligations that the Protocol establishes,"³⁰ defines "particular social group" as follows: "A 'particular social group' normally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality."³¹ Again, Tatiana belongs to a group of women with similar social status under Romanian policies and law, and thus clearly falls within the *Ananeh-Firempong* and UNHCR standards.

In addition to the shared fundamental characteristic, the persecutor's perceptions of the group has also been identified as an important determinant of whether a particular social group exists. In *Gomez v. INS*, the Second Circuit explained that "[a] particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general."³²

The *Gomez* court considered whether an El Salvadoran woman qualified for asylum as a member of a social group of "women who have been previously battered and raped by Salvadoran guerrillas."³³ In rejecting Gomez's claim, the court stated that "[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals

immutable characteristic and one which an asylum applicant should not be compelled to change."'). See also *infra* notes 69-77 and accompanying text.

26. Matter of Acosta, 19 I. & N. Dec. at 231.

27. *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985).

28. *Id.*

29. HANDBOOK, *supra* note 15, ¶¶ 77-79.

30. *INS v. Cardoza-Fonseca*, 480 U.S. 421, at 439 n.22 (1987).

31. HANDBOOK, *supra* note 15, ¶ 77 (emphasis added).

32. *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) (citations omitted).

33. *Id.* at 663.

with membership in a particular social group.”³⁴ It emphasized that Gomez did not provide evidence that women previously assaulted by guerrillas share “common characteristics—other than gender and youth—such that would-be persecutors could identify them as members of the purported group.”³⁵ The court also stressed that “there is no indication that Gomez will be singled out for further brutalization on this basis” and concluded, therefore, that Gomez did not “demonstrate[] that she is more likely to be persecuted than any other young woman.”³⁶

The *Gomez* court appeared to track the UNHCR analysis that governments persecute individuals based on their membership in a social group when groups are perceived as a threat to governmental control over the nation’s political, economic or social systems.

Membership of such a particular social group may be at the root of persecution because there is no confidence in the group’s loyalty to the Government or because the political outlook, antecedents or economic activity of its members, *or the very existence of the social group as such, is held to be an obstacle to the Government’s policies.*³⁷

In contrast to Gomez’s situation as described by the court, Romania’s policies clearly reflect an official intent to squelch both the expression of lesbian and gay identity and the very existence of lesbians and gay men in the country, indicating a belief that lesbians and gay men are such an obstacle to government policy.³⁸ As a result of these policies, Tatiana faces a significant threat of persecution because she is a lesbian.

Although the Ninth Circuit standard diverges from those described above, it also addresses the situation of lesbian women and gay men persecuted on the basis of their sexual orientation. In *Sanchez-Trujillo v. INS*,³⁹ the court defined “particular social group” as “a collection of people closely affiliated with each other, who are actuated by some common impulse or interest.”⁴⁰ Of central concern to the court was “the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a social group.”⁴¹ The court recognized a persecutor’s perception of a segment of society as a social group as relevant

34. *Id.* at 664 (emphasis added).

35. *Id.*

36. *Id.*

37. HANDBOOK, *supra* note 15, ¶¶ 77-78 (emphasis added).

38. *See supra* notes 18-19 and accompanying text.

39. 801 F.2d 1571 (9th Cir. 1986).

40. *Id.* at 1576.

41. *Id.* Commentators have widely criticized the *Sanchez-Trujillo* court’s interpretation for failing to capture adequately the term’s full meaning. *See generally, e.g.,* Daniel Compton, *Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar*, 62 WASH. L. REV. 913 (1987); Parish, *supra* note 10; M. Graves, *From Definition to Exploration: Social Groups and Political Asylum Eligibility*, 26 SAN DIEGO L. REV. 740, 771 (1989); Carolyn P. Blum, *Refugee Status Based on Membership in a Particular Social Group: A North American Perspective*, in *ASYLUM LAW AND PRACTICE IN EUROPE AND NORTH AMERICA: A COMPARATIVE ANALYSIS* (Jacqueline Bhaba & Geoffrey Coll eds., 1992).

but not conclusive.⁴²

Although the Ninth Circuit standard concurs with those in *Matter of Acosta* and *Gomez* in requiring group members to possess a common characteristic or impulse fundamental to their identity, it imposes the additional requirement of a close and voluntary association among group members. Despite its stringency, lesbian women and gay men meet this test; their identities become known publicly as a result of close and voluntary association with other lesbians or gay men, or by self-identification necessary to meet other lesbians or gay men. In Tatiana's case, because she identifies herself as a lesbian and associates with other lesbians both socially and politically, she meets the *Sanchez-Trujillo* standard for membership in a particular social group.⁴³

In general, however, the *Sanchez-Trujillo* "close and voluntary association" requirement makes little sense for a population which, by the very fact of associating, risks almost certain persecution and even capital punishment by governments whose stated intention is to persecute those who identify as lesbian or gay.⁴⁴ In fact, many lesbians and gay men who fear persecution deny their identity and avoid association with others as a matter of self-preservation. The INA does not require such extreme efforts to repress an aspect of identity that "members of the group either cannot change or should not be required to change because it is fundamental to their individual identities or consciences."⁴⁵

IV. Identifying the Group: A Socio-Political Consideration of the "Particular Social Group" of Lesbian Women and Gay Men

Whether currently or historically, people who identify themselves as, or are perceived to be, lesbian or gay experience unique and sometimes oppressive treatment both by the state and by society.⁴⁶ As a population

42. *Sanchez-Trujillo*, 801 F.2d at n.7.

43. In fact, as of August 1993 the first and only immigration court to grant asylum to a man persecuted on account of his membership in the particular social group of gay men followed the analytic framework set out in *Sanchez-Trujillo*. The court reasoned:

There exists a voluntary associational relationship among the members, and a common characteristic that is fundamental to their identity as a member of the social group. Sexual orientation is arguably an immutable characteristic, and one which an asylum applicant should not be compelled to change.

Thus, homosexuals are considered to be members of a particular group.

Matter of Tenorio, No. A72 093 558, at 14.

44. See *supra* notes 3-5 and accompanying text.

45. *Matter of Acosta*, 19 I. & N. Dec. at 233.

46. Indeed, this risk accounts in great part for the fact that many lesbians and gay men do not publicly acknowledge their own lesbian or gay identities. Even without the threat of persecution, many lesbians and gay men do not overtly reveal their sexual orientation to family members or co-workers, fearing rejection, abuse and loss of financial and/or emotional support. See, e.g., Herek, *supra* note 1, at 146; Stewart, *Gay in Corporate America*, *FORTUNE*, Dec. 16, 1991, at 30; Martin P. Levine & Robin Leonard, *Discrimination Against Lesbians in the Workforce*, 9 *SIGNS* 700 (1984). See generally KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* 43-56 (1991).

sharing the fundamental characteristic of minority sexual orientation, lesbians and gay men have long been treated as a distinct and particular social group.

A. Sexual Orientation as an Aspect of Human Identity

Much popular confusion surrounds the nature and origin of sexual orientation. Social scientists and psychologists, however, are careful to distinguish sexual orientation—the erotic and/or affectional attraction to members of the same or opposite gender⁴⁷—from biological sex,⁴⁸ gender identity,⁴⁹ and social sex role.⁵⁰

The term “sexual orientation” itself encompasses several aspects of human identity and activity: 1) sexual conduct with partners of a particular gender; 2) enduring psychological attraction to partners of a particular gender; and 3) private identity based on sexual orientation (thinking of oneself as lesbian, gay, bisexual or heterosexual).⁵¹ In addition, one may claim or be assigned a public identity based on sexual orientation, and identify with a community based on sexual orientation.⁵²

As is evident from this list, sexual orientation refers to much more than sexual behavior.⁵³ Being lesbian or gay forms part of a person’s identity and involves more than simply engaging in sexual conduct with persons of the same gender.⁵⁴ Tatiana, for example, identifies herself as a lesbian, socializes with other lesbian women, and collects information and publications about lesbians in all parts of the world. Her identity as a lesbian does not depend on being in a relationship with another woman, any more than a woman’s identity as a heterosexual depends on being in a relationship with a man.

Most social and behavioral scientists believe that sexual orientation—whether heterosexual, lesbian or gay—is fundamental to human identity and highly resistant to change.⁵⁵ In fact, the American Psychological Association has condemned as unethical the so-called conversion

47. HOMOSEXUALITY, *supra* note 1, at 1. See also Gregory M. Herek, *Sexual Orientation*, in 1 WOMEN’S STUDIES ENCYCLOPEDIA 344 (H. Tierney, ed. 1989).

48. Biological sex refers to chromosomal genetic material. HOMOSEXUALITY, *supra* note 1, at 1. Biological sex is commonly referred to as gender.

49. Gender identity is “the psychological sense of being male or female.” *Id.*

50. Social sex role is “adherence to the culturally created behaviors and attitudes that are deemed appropriate for male or females.” *Id.* See also Herek, *supra* note 1, at 149.

51. See *id.* at 134.

52. *Id.*

53. *Id.* at 134-35.

54. People with a lesbian or gay orientation do not always identify themselves privately or publicly as lesbian or gay. Social pressure to conform to heterosexuality as well as the threat of discrimination and persecution may lead lesbian women and gay men to repress or hide their sexual orientation from others. *Id.* at 135.

55. Social and behavioral scientists generally believe that sexual orientation is set in place at an early age. See A. BELL ET AL., *SEXUAL PREFERENCE: ITS DEVELOPMENT IN MEN AND WOMEN* 186-87 (1981). See also Richard Green, *The Immutability of (Homo)sexual Orientation: Behavioral Science Implications for a Constitutional (Legal) Analysis*,

therapies that attempt to change the sexual orientation of people who are lesbian or gay.⁵⁶

In addition, like race, ethnicity, religion, and political opinion, sexual orientation cannot be altered or renounced according to the dictates of a government in power. Regardless of whether sexual orientation has a genetic origin, lesbian women and gay men cannot disassociate themselves from the basis of their persecution.⁵⁷ To that extent, sexual orientation is indeed immutable.⁵⁸

16 J. PSYCHIATRY & LAW 537 (1988); RICHARD GREEN, *THE "SISY BOY SYNDROME" AND THE DEVELOPMENT OF HOMOSEXUALITY* 370 (1987).

Many experts believe that both biological and socio-environmental factors contribute to the shaping of an individual's sexual orientation. See John Money, *Sin, Sickness, or Status? Homosexual Gender Identity and Psycho-neuroendocrinology*, 42 AM. PSYCHOLOGIST 384 (1987); Herek, *supra* note 1, at 148-51. See also BELL ET AL., *supra*, at 183-86. Recent scientific studies have focused attention on the genetic origins of lesbian and gay orientation. See Natalie Angier, *Report Suggests Homosexuality is Linked to Genes*, N.Y. TIMES, July 16, 1993, at A11; Chandler Burr, *Homosexuality & Biology*, THE ATLANTIC, Mar. 1993, at 47; Natalie Angier, *Study Suggests Genes Sway Lesbians Sexual Orientation*, N.Y. TIMES, Mar. 12, 1993, at A1; Douglas C. Haldeman, *Sexual Orientation Conversion Therapy for Gay Men and Lesbians: A Scientific Examination*, in HOMOSEXUALITY, *supra* note 1, at 149-60; Herek, *supra* note 1, at 151. Cf. Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 79 STAN. L. REV. (forthcoming 1994). It bears mention, as well, that extensive psychological research over three decades has established conclusively that lesbian or gay orientation is not related to psychological adjustment or maladjustment. See John C. Gonsiorek, *The Empirical Basis for the Demise of the Illness Model of Homosexuality*, in HOMOSEXUALITY, *supra* note 1, at 114-36; John C. Gonsiorek, *Results of Psychological Testing on Homosexual Populations*, 25 AM. BEHAVIORAL SCI. 385, 394 (1982); B. F. Reiss, *Psychological Tests in Homosexuality*, in HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL 296-311 (Marmor ed., 1980).

Extensive psychological analyses demonstrate that "theories contending that the existence of differences between homosexuals and heterosexuals implies maladjustment are irresponsible, uninformed, or both." John C. Gonsiorek, *The Empirical Basis for the Demise of the Illness Model of Homosexuality*, in HOMOSEXUALITY, *supra* note 1, at 136.

56. See American Psychological Association (APA), *Fact Sheet on Reparative Therapy*, cited by Haldeman in HOMOSEXUALITY, *supra* note 1, at 160. The Fact Sheet begins: "No scientific evidence exists to support the effectiveness of any of the conversion therapies that try to change sexual orientation." *Id.* In a 1990 statement on conversion therapy, Dr. Brian Welch, Executive Director for Professional Practice of the APA, commented that "research findings suggest that efforts to 'repair' homosexuals are nothing more than social prejudice garbed in psychological accoutrements." *Id.*

57. Cf. David L. Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COL. HUM. RTS. L. REV. 203, 251 (1988) (making this point with respect to gender-based persecution).

58. Discussing the nature of immutability, a Canadian court also provides helpful analysis:

Most of the grounds enumerated . . . as prohibited grounds of discrimination connote the attribute of immutability, such as race, national or ethnic origin, colour, age. One's religion may be changed, but with some difficulty; sex and mental or physical disability, with even greater difficulty. Presumably, sexual orientation would fit within one of these levels of immutability.

Timothy Veysey v. Commissioner of the Correctional Service of Canada, 29 F.T.R. 74, 78 (T.D. 1989), *appeal dismissed*, Fed. Ct. of Appeals, A-557-89 (May 31, 1990).

As a relatively small sector of the population,⁵⁹ lesbians and gay men are by definition a minority within the larger society.⁶⁰ In addition, many countries' laws and policies attempt to repress or subordinate their very existence.⁶¹ As a result, openly lesbian women and gay men "are self-consciously bound together as a community by virtue of these characteristics."⁶² This is certainly true for Tatiana who has close friendships with the few other women and men she knows to be lesbian or gay.

B. Sexual Orientation as a Basis for Treatment as a Social Group

A long and tortured history of institutionalized discrimination against lesbian women and gay men sadly attests to the differential treatment of this minority group.⁶³ Sanctioned police assault and brutality are

59. Lesbians and gay men are commonly thought to constitute between five and ten percent of the United States population, comprising the first, second or third most numerous minority in the United States. See John C. Gonsiorek and James D. Weinrich, *The Definition and Scope of Sexual Orientation*, in *HOMOSEXUALITY*, *supra* note 1, at 11-12. The validity of recent studies which report lower percentage figures has been challenged. See F. Barringer, *Sex Survey of American Men Finds 1% Are Gay*, N.Y. TIMES, Apr. 15, 1993, at A1; J. Schmalz, *Survey Stirs Debate on Number of Gay Men in U.S.*, N.Y. TIMES, Apr. 16, 1993, at A20. Although no similar global study has been completed, evidence exists of lesbians and gay men in all countries around the world.

60. Although it was articulated nearly forty years ago, see D. W. CORY, *THE HOMOSEXUAL IN AMERICA* (1951), the notion that lesbians and gay men constitute a minority group comparable to racial, ethnic and religious minorities has recently gained more acceptance. Gregory M. Herek, *Stigma, Prejudice, and Violence Against Lesbians and Gay Men*, in *HOMOSEXUALITY*, *supra* note 1, at 63 (citing F. E. Kameny, *Homosexuals as a Minority Group*, in *THE OTHER MINORITIES* 50-65 (Edward Sagarin ed., 1971)).

61. See LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH-CENTURY AMERICA* (1991). INTERNATIONAL LESBIAN AND GAY ASSOCIATION, *ILGA PINK BOOK: GLOBAL VIEW OF LESBIAN AND GAY LIBERATION AND EXPRESSION* (2nd ed. 1988) (surveying official attitudes and laws concerning lesbians and gay men around the world).

62. See JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN AMERICA* (1983); DENNIS ALTMAN, *THE HOMOSEXUALIZATION OF AMERICA, THE AMERICANIZATION OF THE HOMOSEXUAL* (1982); William Paul, *Minority Status for Gay People—Majority Reaction and Social Context*, *HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL AND BIOLOGICAL ISSUES* 356 (Paul et al. eds., 1982).

63. Although the Greeks and Romans had relatively free attitudes regarding sexuality, increased official repression of sexuality accompanied the spread of Christian doctrine. See generally M. GOODICH, *THE UNMENTIONABLE VICE: HOMOSEXUALITY IN THE LATER MEDIEVAL PERIOD* (1970). While homosexual conduct was sometimes tolerated during the first thousand years of Christian hegemony, J. BOSWELL, *CHRISTIANITY, TOLERANCE & HOMOSEXUALITY* (1980), in the thirteenth century, it was popularly defined as more "unnatural" than other "unnatural" sex such as masturbation, nonprocreative or nonmarital heterosexual conduct, and procreative heterosexual intercourse in other than the approved position. See Arthur N. Gilbert, *Conceptions of Homosexuality and Sodomy in Western History*, 6 J. HOMOSEXUALITY 57, 62 (1981). These ecclesiastical proscriptions first entered canon law, V. BULLOUGH, *SEXUAL VARIANCE IN SOCIETY AND HISTORY* 380-81 (1976), and later became part of criminal codes or common law of England and other European countries. P. CONRAD & J. SCHNEIDER, *DEVIANCE AND MEDICALIZATION: FROM BADNESS TO SICKNESS* 172-29 (1980). Eventually, during the eighteenth century Age of Enlightenment, homosexuality came to be viewed as pathological. *Id.* at 179-85.

among the most dangerous manifestations of official targeting of lesbians and gay men.⁶⁴ In still other instances, gay men and lesbians face harsh criminal liability, and in some cases the death penalty, for engaging in consensual sexual relationships, for identifying themselves as lesbian or gay, or for asserting basic civil rights.⁶⁵

Pervasive negative stereotypes fuel the discriminatory treatment of lesbian and gay people as a group, most of which relate to sex role characteristics.⁶⁶ Additional stereotypes characterize gay men "as mentally ill, promiscuous, lonely, insecure, and likely to be child molesters, while lesbians have been described as aggressive and hostile toward men."⁶⁷ Relying on these stereotypes as well as anti-gay religious doctrine and other sources, many governments and societies endorse discrimination against, and sometimes persecution of, lesbian and gay members of society.⁶⁸ The Romanian laws and policies which threaten Tatiana exemplify this reliance.

Nearly three decades of extensive and well-documented psychological research has come to the precise opposite conclusion: lesbian or gay sexual orientation "in and of itself bears no necessary relationship to psychological adjustment." John C. Gonsiorek, *The Empirical Basis for the Demise of the Illness Model of Homosexuality*, in *HOMOSEXUALITY*, *supra* note 1, at 136. Twenty years ago, the American Psychiatric Association acted on this conclusion and removed homosexuality from its list of mental disorders. Resolution of the American Psychiatric Association, December 15, 1973.

64. In Argentina, for example, state and local police have a practice of targeting gay men for harassment and sometimes assault. In one case, police repeatedly tortured a gay man over a period of many years in several different cities. Because the man is gay, police threatened him, held him in isolation, and subjected to him multiple beatings and sexual assaults. This man ultimately obtained asylum in Canada based on his persecution as a member of the social group of lesbians and gay men. Matter of Jorge Alberto Inaudi, File No. T91 04459 (Immigration and Refugee Board, Canada, Apr. 19, 1992) (describing extreme police brutality against Argentinean asylum applicant); *see also* ILGA PINK BOOK, *supra* note 61.

Similarly, a Cuban man whose deportation from the United States was ordered to be withheld because of persecution based on his membership in the social group of gay men reported a common practice of police and governmental harassment and brutality against gay and lesbian Cubans. *See* Matter of Toboso, No. A23 220 644 (withholding deportation of gay Cuban man based on government's persecution of gay men), *aff'd* Matter of Toboso, No. A23 220 644 (BIA Mar. 12, 1990).

65. *See, e.g.*, Iranian and Nicaraguan laws, *supra* note 4.

66. Gregory M. Herek, *Beyond "Homophobia": A Social Psychological Perspective on Attitudes Toward Lesbians and Gay Men*, 10 J. *HOMOSEXUALITY* 1, 6 (1984) (summarizing research).

67. *Id.*

68. Of course, not all governments give effect to such negative views. Eight states, over 110 municipalities and many employers in the United States prohibit sexual orientation-based discrimination. *See* Lambda Legal Defense & Education Fund, *A National Summary of Anti-Discrimination Laws* (1992). *Cf.* *Evans v. Romer*, 854 P.2d 1270 (Colo.), *cert. denied*, 62 U.S.L.W. 3254 (U.S. Nov. 1, 1993) (No. 93-453) (upholding injunction against enforcement of amendment to state constitution that would prohibit state from banning discrimination against lesbians, gay men and bisexuals). In the area of military service, the United States and Britain are the only parties to the North Atlantic Treaty Organization (NATO) that exclude openly lesbian and gay service members. *See* Riding, *In NATO, Only U.S. and British Ban Gay Soldiers*, N.Y. TIMES, Nov. 13, 1992, at A12.

V. Applying the Legal Standard: Lesbians and Gay Men as a Particular Social Group in the United States

Complementing social science analyses regarding sexual orientation, Congress and the courts identify and treat lesbians and gay men as a distinct social group, providing support for the argument that lesbians and gay men meet eligibility standards of United States asylum law.

A. *Matter of Toboso*

The Board of Immigration Appeals (BIA) has already decided that lesbians and gay men are a "particular social group" under the INA in its only reported decision on the matter.⁶⁹ At the initial proceeding involving the asylum application of a gay Cuban man, Fidel Armando Toboso, an immigration judge ordered Toboso's deportation to be withheld based on his finding of a pattern of anti-gay discrimination and persecution experienced directly by Toboso and by gay men and lesbians in Cuba generally.

The Cuban government generally discourages homosexuality, as is made clear by their [sic] efforts to dissuade individuals from participating in this type of lifestyle and as evidenced by the actions committed against this applicant. Thus, the applicant has met his burden of establishing a "fear of persecution," whether the standard applied be "well-founded," "clear probability," "reasonable belief," "realistic likelihood," or any other appropriate standard.⁷⁰

The court concluded that "such persecution results from his membership in a particular social group, that group being homosexuals."⁷¹ Applying the definition of "social group" set forth in *Matter of Acosta*, the court found that Toboso was "a member of a group of persons who share a common, immutable characteristic (i.e. homosexuality), and that this characteristic is one which members of the group either cannot change or should not be required to change because it is fundamental to their individual identities or consciences."⁷² The immigration judge in *Toboso* concluded that "[t]he evidence thus establishes the existence of a 'particular social group' which is persecuted by the Cuban government on account of the group's specific identifying characteristic, and whose treatment based on this characteristic is distinct from the general

69. *Matter of Toboso*, No. A23 220 644 (BIA 1990) (withholding deportation of gay Cuban man based on government's persecution of gay men). The question of asylum eligibility for lesbian women and gay men has not been addressed beyond the Board level. Notably, in the first ruling of its kind in the United States, an immigration judge granted asylum to a Brazilian man who feared persecution on account of his membership in the particular social group of gay men and lesbians. *Matter of Tenorio*, No. A72 093 558 (July 26, 1993), *appeal pending*.

70. *Matter of Toboso*, No. A23 220 644, at 4 (citing *INS V. Stevic*, 104 S. Ct. 2489 (1989) and *Matter of Acosta*, 19 I. & N. Dec. 211).

71. *Id.*

72. *Id.* at 5. See *supra* notes 54-58 regarding the fundamental nature of sexual orientation.

population.”⁷³

On appeal, the Immigration and Naturalization Service (INS) argued, unsuccessfully, against the ruling that lesbian women and gay men constitute a social group. Asserting that “‘homosexual activity is not a basis for finding a social group within the contemplation of the Act,’” the Service argued that such a conclusion “‘would be tantamount to awarding discretionary relief to those involved in behavior that is not only socially deviant in nature, but in violation of the laws or regulations of the country as well.’”⁷⁴

Rejecting the INS arguments, the BIA determined that the Cuban government did not target Toboso because of his activities, but rather because of “his having the status of being a homosexual.”⁷⁵ It reasoned as well that “the Service has not challenged the immigration judge’s finding that homosexuality is an ‘immutable’ characteristic. Nor is there any evidence or argument that, once registered by the Cuban government as a homosexual, that characterization is subject to change.”⁷⁶ In conclusion, the BIA ruled that the status-based persecution against Toboso as a gay man warranted an order to withhold Toboso’s deportation.⁷⁷

73. *Id.* (citing *Matter of Sanchez and Escobar*, Int. Dec. 2996, (BIA 1985)). The judge cited the United States policy of excluding openly lesbian and gay immigrants as evidence that the INS recognized lesbians and gay men as a social group. *Id.* In discussing the exclusion, however, the judge carefully distinguished discrimination from persecution: “Though Congress may have intended to exclude homosexuals from entering the United States, there is no indication that Congress ever sought in the past, or would seek at the present time, to condemn homosexuals to a life of suffering and persecution solely as a result of their sexual orientation.” *Id.* at 6.

74. *Matter of Toboso*, No. A23 220 664, at 4.

75. *Id.* The BIA considered a long list of instances in which Toboso was singled out for official harassment or attack specifically because he was gay and thereby part of a group targeted for persecution by the Cuban government. *Id.* at 2-5. It reviewed testimony, for example, about regular notices requiring “Fidel Armando Toboso, homosexual” to appear for a physical examination which was often followed by several days of police detention without any charges pressed against him and about Toboso being sent to a forced labor camp as punishment because he was gay. *Id.* at 2-3. Additional testimony and evidence described Cuba’s general policy and practice of persecuting gay people. *Id.*

Unwillingness of government authorities to investigate or prosecute criminal acts perpetrated against lesbians and gay men may also amount to persecution. In *Matter of Tenorio*, No. A72 093 558, the immigration court based its decision to grant Tenorio asylum on expert testimony, background documentation regarding persecution by anti-gay paramilitary groups and the applicant’s own testimony regarding his fear. The court found that “[a]nti-gay groups appear to be prevalent in Brazilian society and continue to commit violence against homosexuals, with little investigation and few criminal charges being brought against the perpetrators. Thus it appears that homosexuals as a social group have been targeted for persecution in Brazil based upon the characteristics of the group members. *Id.* at 15-16.

76. *Matter of Toboso*, No. A23 220 664, at 4-5.

77. *Id.* at 5-6. The immigration judge found Toboso to be statutorily eligible for asylum and withholding of deportation as a member of a particular social group who feared persecution by his government. However, because Toboso had two minor convictions, the immigration judge chose not to exercise his discretion to grant the

B. United States Law and Policy

Congress has also recognized that lesbians and gay men constitute a social group. In the area of bias violence, which has obvious parallels to social group-based persecution, Congress has condemned status-based maltreatment of lesbians and gay men in the recently enacted Hate Crimes Statutes Act.⁷⁸ The Act requests that states monitor and report bias-motivated assaults against lesbians and gay men on the same basis as attacks based on race, national origin, and other categories.

Recent changes to United States immigration law also reflect a Congressional intent to end discrimination against lesbians and gay men in some areas of federal law. In 1990, Congress repealed a law that barred the entire class of lesbian women and gay men from immigrating to the United States.⁷⁹

In other contexts, courts have unquestioningly treated lesbians and gay men as a social group, often in situations where individual lesbians and gay men suffered discrimination based on their sexual orientation.⁸⁰ Although many of these courts did not find the discriminatory practices unconstitutional, their analysis nonetheless bolsters an interpretation of Section 208(a) of the Refugee Act that recognizes lesbians and gay men as a particular social group. Justice Brennan eloquently made this very point:

[Lesbians and gay men] constitute a significant and insular minority of this country's population. Because of the immediate and severe oppro-

asylum application but instead issued an order to withhold Toboso's deportation pursuant to section 243(h) of the Act. *Matter of Toboso*, No. A23 220 664, at 7-8.

78. Pub. L. No. 101-275, 104 Stat. 140 (1990) (to be codified at 28 U.S.C. § 538).

79. INA § 212(a)(4), 8 U.S.C. § 1182(a)(4) (repealed 1990 by H.R. 1280, 101st Cong., 1st sess. (1989)). Over twenty years earlier, the United States Supreme Court upheld a ban on lesbian and gay people immigrating based on a law which barred entry by people with "psychopathic personalities." *Boutilier v. INS*, 363 F.2d 488 (2d Cir. 1966), *aff'd*, 387 U.S. 118 (1967). After the Public Health Service announced through the U.S. Surgeon General an end to certification of gay people as "psychopathic personalities" based on shifts in medical analysis, see Rhonda Rivera, *Sexual Orientation and the Law*, in *HOMOSEXUALITY*, *supra* note 1, at 88 (citing Memorandum from Julius Richmond, assistant secretary for Health, United States Department of Health, Education and Welfare, and Surgeon General, to William Foege and George Lythcott (Aug. 2, 1979), reprinted in 56 Interpreter Releases 398-99 (1979)), the Ninth Circuit ruled that lesbian and gay immigrants without such certification must be admitted. *Hill v. INS*, 714 F.2d 1470 (9th Cir. 1983). *But see In re Longstaff*, 716 F.2d 1439 (5th Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984).

Even while the ban was firmly in place, the Board of Immigration Appeals withheld deportation of a Cuban man who faced persecution for being gay. *See supra* notes 69-77 and accompanying text. *Cf. In re Brodie*, 394 F. Supp. 1208 (D. Or. 1975) (granting naturalization of openly gay alien despite ban).

80. *See, e.g., High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990) (upholding defense department practice of expansive security clearance investigations for lesbian and gay applicants); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989) (upholding military's policy to exclude lesbians and gay men from service in armed forces), *cert. denied*, 494 U.S. 1004 (1990); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987) (upholding FBI's refusal to hire lesbian applicant based on sexual orientation).

brium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena. Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is "likely . . . to reflect deep-seated prejudice rather than rationality."⁸¹

In addition, courts have increasingly condemned the discrimination that sometimes accompanies such identity/group-based treatment of lesbians and gay men.⁸²

Taken as a whole, judicial interpretations and Congressional policy illustrate the identification and treatment of lesbians and gay men as a particular social group in American society and jurisprudence, as well as a growing intolerance of sexual orientation-based discrimination.

C. Criminalization of Sodomy and Identity-Based Persecution

Countries generally target lesbian women and gay men for persecution based on their identity, often without regard to whether they actually engage in sexual relations with others.⁸³ Even laws that criminalize consensual sex between lesbian women or gay men, however, reflect a state policy of persecution when the penalties imposed are extremely severe, disproportionate to the putative statutory goal, or administered without due process.⁸⁴ A Federal Administrative Court in the Republic of Germany, for example, found that Iran's imposition of the death penalty amounts to persecution because of its severity (100 strokes for the first two offenses, death for the third), its disproportionality relative to the statute's stated goal of "suppression of a violation of public morality,"

81. *Rowland v. Mad River*, 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of certiorari) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982)).

82. *See, e.g., Meinhold v. United States Department of Defense*, 808 F. Supp. 1455 (C.D. Cal. 1993) (rejecting military's proffered rationale for ban on lesbians and gay men from service), *stay denied*, 61 Empl't. Prac. Dec. (CCH) P 42197 (9th 1993); *Pruitt v. Cheney*, 963 F. 2d 1160 (9th Cir. 1991), *cert. denied*, 61 U.S.L.W. 3418 (1992) (upholding denial of motion to dismiss; military must prove at trial rational basis for ban on lesbians and gay men); *Dallas v. England*, 846 S.W.2d 957 (Tex. App. 1993) (striking down Texas' sodomy law and barring Texas police force from discriminating based on sexual orientation); *Commonwealth of Kentucky v. Wasson*, 842 S.W.2d 487 (Ky. 1992) (striking down Kentucky's sodomy law as a violation of right to privacy under Kentucky constitution).

83. Police and other state representatives carry out formal and informal policies of status-based persecution through severe harassment of and direct violent assaults on lesbian women and gay men. *See supra* notes 69-77 and accompanying text.

84. *See HANDBOOK, supra* note 15, ¶ 85; *Ramirez-Rivas v. INS*, 899 F.2d 864, 868 (9th Cir. 1990), *vacated*, 112 S.Ct. 858 (1992); *Blanco-Lopez v. INS*, 858 F.2d 531, 533-34 (9th Cir. 1988); *Diminich v. Esperdy*, 299 F.2d 244, 246 (2d Cir. 1961), *cert. denied*, 369 U.S. 844 (1962) (punishment constitutes persecution when criminal sanction is not "reconcilable with generally recognized concepts of justice"); *Matter of Banjeglay*, 10 I. & N. Dec. 351 (Comm. Aug. 28, 1963). *See also* Parish, *supra* note 10, at 953.

and the "unusually low standard of proof."⁸⁵ Strikingly, the fact that sodomy could be criminalized did not deter the court from identifying Iran's law as a weapon of persecution.⁸⁶

In light of the critical distinction between regulation of sexual activity and persecution of lesbians and gay men, criminalization of sodomy in parts of the United States should not interfere with the grant of asylum to a person whose life is endangered because she or he is lesbian or gay. The Supreme Court's ruling in *Bowers v. Hardwick*⁸⁷ that the constitutional right to privacy does not encompass sexual relations between consenting lesbian and gay adults is largely irrelevant to the discussion of whether lesbians and gay men are eligible for asylum. *Bowers*, a due process challenge to the Georgia sodomy law, focuses exclusively on criminalization of sexual conduct, with no reference to lesbian or gay identity.⁸⁸ Moreover, both before and after *Bowers*, courts have refused to permit infringement of established constitutional guarantees of equal protection and first amendment freedoms based on prejudice against gay men and lesbians.⁸⁹

Although not as extreme as Iran's imposition of the death penalty, Romanian laws that criminalize homosexuality and the extreme harassment by detention and forced hospitalization carried out by state officials in reliance on the laws evidence the state's intention to persecute lesbians and gay men.⁹⁰ Tatiana's argument that Romania persecutes lesbians and gay men, rather than merely regulates their conduct, is thus well-founded.

85. 79 BverwGE 143, 144-45 (1988) (citing the Islamic Criminal Code of Iran of August 25, 1982, arts. 139-141)).

A judge's "own knowledge" of such matters may form the basis for a conviction under the Iranian sodomy law. In contrast, the German court found the standard of proof for heterosexual adultery and other "moral" crimes so high to make convictions very difficult to achieve. *Id.* at 144, 153-54.

Considering these factors together with government statements regarding homosexuality, the German court concluded that Iran's "chief goal, the propagation of Islamic ideals of order and morality, include[s] the elimination and extermination of those who do not fit into this vision." *Id.* at 153.

86. *Id.* Cf. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1982) (holding that N. Ireland statute totally prohibiting sodomy between adult males breached European Convention on Human Rights).

87. 478 U.S. 186 (1986).

88. See Cass Sunstein, *Sexual Orientation and the Constitution: A Note of the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1168 (1988).

89. See, e.g., *Pruitt v. Cheney*, 963 F.2d 1160, 1165 (footnote omitted) (9th Cir. 1991), *cert. denied*, 61 U.S.L.W. 3171 (1992) ("Prejudice of others against homosexuals should not be given unexamined effect today as a matter of law."); *Gay Activists Alliance v. Board of Regents of Univ. of Oklahoma*, 638 P.2d 1116 (Okla. 1981) (student association organized to advocate for lesbian and gay civil rights entitled to recognition by university).

90. See *supra* note 18.

VI. Setting an International Standard: Lesbians and Gay Men as a Particular Social Group in Courts Worldwide

Several courts around the world have granted asylum to lesbians and gay men persecuted on the basis of their sexual orientation.⁹¹ Concluding that lesbians and gay men constitute a social group, these courts granted refuge from persecution to applicants who either experienced physical assault by government officials or faced the threat of capital punishment for consensual lesbian and gay sexual relationships in their country of origin.

In *Matter of Inaudi*, the Refugee Division of the Canadian Immigration and Refugee Board granted asylum to an Argentinean man who experienced extensive harassment by police and military officers over an eight year period. After detailing a painful and lengthy history of official brutality toward Jorge Inaudi based on his identity as a gay man, the court found: "There is no question, in my mind, that the experiences as described by the claimant amount to persecution."⁹² As to the question of whether the persecution occurred for a reason condemned by international refugee law, the court examined the Refugee Convention's historical origins,⁹³ the UNHCR *Handbook* definition, expert analysis, and dictionary definitions of social and group and found that "homosexuals, be they male or female, are members of a particular social group."⁹⁴

In Germany, a Federal Administrative Court of the Federal Republic of Germany affirmed a decision granting asylum to a gay man from Iran, finding a probability of persecution based on the applicant's sexual orientation.⁹⁵ In its ruling, the court cited the persecution of gay people in Nazi concentration camps as an example of group-based treatment of lesbians and gay men. Finding that the claimant would be threatened with the death penalty if returned to Iran, the court reasoned that a well-

91. See, e.g., 1 INT'L J. REFUGEE L. 246 (1989) (summary of case before Holland's *Afdeling Rechtspraak van de Raad van State*); *Matter of Jorge Alberto Inaudi*, File No. T91 04459 (Immigration and Refugee Board, Canada, April 9, 1992).

92. *Matter of Inaudi*, slip op. at 4.

93. The court noted that the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 137 (1951), from which the Protocol was derived, aimed primarily to protect those fleeing Hitler and Stalin, both of whom had persecuted lesbians and gay men. *Id.* See generally ROBERT PLANT, *THE PINK TRIANGLE: THE NAZI WAR AGAINST HOMOSEXUALS* 181 (1986); Karlinsky, *Unearthing Russia's Gay Past*, *THE ADVOCATE*, Dec. 3, 1991 (discussing persecution of gay men under Stalin).

94. *Inaudi*, slip op. at 5. The court reasoned:

Social group is not defined in the *Immigration Act*. I believe, therefore, that the words should be given their ordinary and useful meaning. The Oxford Dictionary defines social as "capable of being associated or united." Clearly homosexuals are capable of being associated or united. The same dictionary defines group as "a number of persons classed together on account of a certain degree of similarity." Homosexuals are classed together on account of a certain degree of similarity, i.e. that they are attracted to persons of their own gender.

Id.

95. Bundesverwaltungsgericht, Case #19880315 (summarized in 1 INT'L J. REFUGEE L. 110-11 (1989)).

founded fear of persecution existed based on the inevitability of the claimant's future behavior. The court found as well that Iran treats lesbians and gay men as "counterrevolutionary criminals."⁹⁶

Conclusion

As the political world order continues to shift, lesbian women and gay men enter increasingly into the ranks of refugees pressing for asylum. Tatiana exemplifies members of this class of women and men who experience and fear severe treatment imposed by their governments because they are lesbian or gay. The extreme official persecution perpetrated against lesbian women and gay men underscores the need to respond to women such as Tatiana and to protect this group of refugees.

As members of "a particular social group," lesbian and gay nationals of countries with threatening laws and practices should be eligible for asylum under the United States Immigration and Nationality Act standards. The discussion of Tatiana's case illustrates that being lesbian or gay is fundamental to human identity and, as such, should be recognized as a characteristic that individuals should not be required to change according to the dictates of the government in power. Claims such as Tatiana's will become increasingly common as the body of information documenting persecution grows and as advocates press these claims on behalf of lesbian women and gay men who must leave their home countries in order to survive.

96. *Id.*

